No. 265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924 1925

KANSAS CITY TERMINAL RAILWAY COMPANY, *et al.*,

Petitioners,

vs.

CENTRAL UNION TRUST COMPANY OF NEW YORK, Trustee, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUBJECT INDEX.

PAGE

STATEMENT 1

POINT I. There is in this case no question which, under the principles laid down by this Court, is a basis for the issuance of a writ of certiorari.. 5

POINT II. The fairness and reasonableness of the offer to unsecured creditors, on the basis of value, is not a question of public or general interest.. 7

POINT III. This Court has already decided that the claim of the Petitioners to special treatment for the Terminal Contracts is not a question in respect of which a writ of certiorari will be issued. The argument contained in Point II of the Petitioners' brief is merely an attempt to have this Court reconsider that decision..... 9

CONCLUSION: The respondents respectfully submit that this Court should deny the application.... 13

EXHIBIT A 15

TABLE OF CASES.

	PAGE
Baker v. *Central Trust Co.*, 235 Fed. 17	10, 11
Biddle v. *Lavisch*, 266 U. S. 173 (Preliminary Print, Number Two)	5
Des Moines R. Co. v. *Wabash Ry. Co.*, 135 U. S. 576	9, 10, 11
Express Company v. *Railroad Company*, 99 U. S. 191	9, 10
Hoard v. *Chesapeake & O. Ry.*, 123 U. S. 222	11
Howard v. *Maxwell Motor Company*, 269 Fed. 292; 275 Fed. 53	7, 11
Kansas City Terminal Railway Co. et al. v. *Central Union Trust Co. et al.*, 294 Fed. 32; 264 U. S. 588	2, 6, 9
Magnum Co. v. *Coty*, 262 U. S. 159	5, 10
Northern Pacific Railroad Co. v. *Boyd*, 228 U. S. 482	4, 7, 10
Phipps **v.** ***Chicago, R. I. & P. Ry. Co.***, 284 Fed. 945	7
Pierce v. *United States*, 255 U. S. 398	11
Western Union Telegraph Company v. *U. S. & Mexican Trust Co.*, 221 Fed. 545	7
Wiggins Ferry Co. v. *Ohio & M. Ry. Co.*, 142 U. S. 396, 408	11

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Petitioners,

vs.

CENTRAL UNION TRUST COMPANY OF NEW YORK,
Trustee, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement

Missouri, Kansas & Texas Railway Company (hereinafter called the Old Company) and eleven other railroad companies were parties to certain contracts (hereinafter collectively called the Terminal Contracts) giving to the Old Company and such other railroad companies the right to use for a period of two hundred years certain terminal facilities in Kansas City, Missouri, belonging to Kansas City Terminal Railway Company. The Petitioners in this case are Kansas City Terminal Railway Company, certain of the railroad companies which were parties to the Terminal Contracts, and the Trustees under the mortgage of Kansas City Terminal Railway Company. In the proceedings in the District Court of the United States for the

Eastern District of Missouri for the foreclosure of certain mortgages on the property of the Old Company, these Petitioners filed an intervening petition claiming, among other things, that the Terminal Contracts were entitled to priority in equity over the mortgages of the old Company in foreclosure, and that the District Court, in its final decree of foreclosure and sale, should require the purchasers of the property sold thereunder to assume the Terminal Contracts.

The District Court denied the prayer of the intervention, and entered its Final Decree, giving the purchasers of the property sold the right to disaffirm the Terminal Contracts. The petitioners thereupon appealed to the Circuit Court of Appeals for the Eighth Circuit. That Court in *Kansas City Terminal Railway Company, et al.* v. *Central Union Trust Company et al.*, 294 Fed. 32, unanimously affirmed said Final Decree on the ground that the Terminal Contracts were simply executory contracts, had no priority over the mortgages of the Old Company, were not binding on the purchasers at foreclosure sale and need not be assumed by such purchasers. A petition for rehearing was denied. Thereupon petition was made to this Court for a writ of certiorari, which was denied (264 U. S. 588). This earlier appeal of the Petitioners is hereinafter called for convenience the First Appeal.

In due course, petition was made to the District Court for confirmation of the sale of the property sold pursuant to said Final Decree to Missouri-Kansas-Texas Railroad Company (hereinafter called the New Company) pursuant to a Reorganization Plan filed with the District Court. Under this Reorganization Plan, in order to provide the money necessary for the reorganization, stockholders of the Old Company were given the right to purchase certain securities of the New Company. Unsecured creditors of the Old Company were offered certain securities of the New Company, without payment, and were given an alternative

right, if they should so elect, to purchase certain securities on better terms than those offered to stockholders. Petitioners appeared at the hearing on the petition for confirmation and objected to confirmation of the sale, on the ground that the offer made to creditors of the Old Company pursuant to said Reorganization Plan was not a fair and reasonable offer, or if fair and reasonable as to creditors in general, was not fair and reasonable as to them, because no offer could be fair and reasonable as to them except an offer to assume the Terminal Contracts. The District Court, after a full hearing, held that the offer was fair and reasonable as to creditors generally and as to the petitioners, and confirmed the sale. Thereupon the Petitioners appealed from the order confirming the sale to the Circuit Court of Appeals for the Eighth Circuit. This appeal is hereinafter called for convenience the Second Appeal. The Circuit Court of Appeals, after hearing argument, certified to this Court the following questions:

> "Question I. Is a plan of reorganization of a railway company sufficient as to unsecured creditors and binding upon them which does not give precedence to the entire claim of the creditor over any part or interest of a stockholder in the old company?
>
> Question II. Is such a plan fair and binding upon such creditors even though they be offered securities of the same grade as the stockholders, the difference being only in the greater amount offered the creditor, provided the court shall be of the opinion that the offer tenders to such creditor all that could reasonably be expected under all of the existing circumstances?
>
> Question III. Is such offer as to such creditors fair and binding if it consists only of the same grade of securities as offered the stockholders, the difference being that the right of the stockholder to participate is conditioned upon the payment of an assessment or the payment of a relatively greater as-

> sessment than that asked of such creditors, provided the court shall be of the opinion that the offer tenders to such creditor all that could reasonably be expected under all of the existing circumstances?"

The Petitioners are now requesting this Court to issue a writ of certiorari, bringing up to this Court the entire record of the Second Appeal.

The sole controversy in the Second Appeal is whether the offer made by the Reorganization Managers to unsecured creditors of the Old Company was a fair, reasonable and legal offer, that is (1) whether the offer was fair and reasonable on the basis of the *value* of securities offered to secured creditors, unsecured creditors and stockholders, respectively, in the light of all the facts of this case, and (2) whether, under the principle enunciated by this Court in *Northern Pacific Railroad Co.* v. *Boyd*, 228 U. S. 482, an offer to unsecured creditors must consist entirely of cash and/or of securities prior in rank to any securities offered or sold to stockholders. The first question is one primarily of fact, of *value*, and obviously, from the form of the questions certified to this Court, the Circuit Court of Appeals is prepared to answer it in the affirmative and does not require the instruction of this Court. The second question is a question of law, involving the *character* of the securities offered. This is the question which has been certified to this Court.

The Petitioners, however, attempted on the argument before the Circuit Court of Appeals, as they have attempted in their brief to this Court, to inject into the Second Appeal their claim, which was finally settled adversely to them on the First Appeal, that the Terminal Contracts are of such an unusual nature that they are prior to mortgage liens and must be assumed by purchasers at foreclosure sale. This contention is *res adjudicata* as between these parties, it having been finally settled in this case and be-

tween these parties by the decision of the Circuit Court of Appeals in the First Appeal, and by the refusal of this Court to grant a writ of certiorari in respect of that decision, as more fully set out under Point III below, and cannot now be reargued.

It may be mentioned in passing that the Petitioners have claimed that the offer of the Reorganization Managers to unsecured creditors was not made to them. The District Court expressly held that the offer was made to the Petitioners, and they do not seriously contend that this question is one with which this Court should concern itself. Obviously it is not. It may be stated, however, that not only were copies of the offer of the Reorganization Managers served on the Petitioners but the offer was expressly made to them in open court at the hearing on the petition for confirmation of sale.

POINT I.

There is in this case no question which, under the principles laid down by this Court, is a basis for the issuance of a writ of certiorari.

This Court has recently said, in *Magnum Co.* v. *Coty*, 262 U. S. 159, at page 163:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort";

Even more recently this Court, in *Biddle* v. *Lurisch*, 266 U. S. 173 (Preliminary Print, Number Two) (decided No-

vember 17, 1924), in dismissing a certificate sent up by the Circuit Court of Appeals, said:

> "The constantly increasing demands upon us make it highly important that only matters which are both substantial and in approved form should be presented."

Obviously, the Circuit Court of Appeals did not consider any question in this case, except those which it has certified, important enough to be brought to the attention of this Court and does not require the instructions of this Court on any other point. The Petitioners, however, are asking this Court to spend its valuable time in an examination of the elaborate and voluminous record in this case, prior to any decision by the Circuit Court of Appeals. Moreover, they base their claim to this Court's attention almost entirely on their claim of priority for the Terminal Contracts. That claim was finally settled adversely to them in the First Appeal, and this Court has already decided that it is not of sufficient public interest to justify the issuance of a writ of certiorari. *Kansas City Terminal Railway Company et al* v. *Central Union Trust Company of New York, Trustee, etc. et al*, 264 U. S. 588. The question is *res adjudicata*.

The two contentions on which the Petitioners base their claim are briefly discussed under Points II and III below. The Respondents believe, however, that it will be obvious to this Court from the preceding statement of facts that this case does not come within the tests laid down by this Court in the cases above referred to.

POINT II.

The fairness and reasonableness of the offer to unsecured creditors, on the basis of value, is not a question of public or general interest.

The Circuit Court of Appeals for the Eighth Circuit has, in effect, asked this Court to determine whether, under the doctrine of the *Boyd* case, the offer to creditors in this case is *legal*, that is, whether an offer to creditors in a reorganization, although fair and reasonable on the basis of value, must be held an unfair and unreasonable offer if it does not consist entirely of cash and/or of securities prior in rank to any securities offered to stockholders. This doubt in the minds of the Circuit Court of Appeals presumably arises from the reference to "preferred stock or income bonds" in the *Boyd* case. The question has never been decided by this Court. The Circuit Courts of Appeals which have considered the question have, so far as the respondents are advised, uniformly reached the conclusion that the proper test was the relative value, rather than the character, of the securities offered to creditors and stockholders. *Howard* v. *Maxwell Motor Company*, 269 Fed. 292 (especially page 294); affirmed 275 Fed. 53 (2nd Circuit); *Western Union Telegraph Company* v. *U. S. and Mexican Trust Company*, 221 Fed. 545, at p. 549 (8th Circuit); *Phipps* v. *Chicago, R. I. & P. Ry. Co.*, 284 Fed. 945, at p. 950 (8th Circuit).

The petitioners, however, ask this Court to pass on a further question, viz., whether the offer made to creditors in this particular case was fair and reasonable on the basis of the value of the securities offered. This question is of no public or general interest whatsoever. It is limited to this particular case and can be decided only on consideration of all the facts in this case. The decision of such a question would be of no value as a precedent or as a guide to the lower Federal courts, since every such question must be decided on the special facts of the case in which it arises.

It may be assumed from the questions certified by the Circuit Court of Appeals that that court has made up its mind that the offer to creditors in this case is fair and reasonable, on the basis of value. The fairness and reasonableness of the offer to creditors can only be determined by a consideration of all the evidence in these proceedings as well as the pleadings and orders and decrees made from time to time during the receivership. Among other things there must be taken into account (1) the value of the property reorganized; (2) the amount, if any, which creditors could have realized on their claims if it had not been possible, with the assistance of the stockholders and the money which they furnished, to put through a reorganization, and (3) the value of the securities offered to the secured creditors, the unsecured creditors and the stockholders, respectively. All the facts on which the decision must be based are peculiarly within the knowledge of the District Court which had charge of this property, through its Receiver, for seven years, and of the local Circuit Court of Appeals which was in close touch with the general situation.

For this Court to pass on this question would require it to make a detailed study of the history of the receivership and of the reorganization, and a detailed analysis not only of the value of the offer made to unsecured creditors, but also of the value of the offers made to secured creditors and of the rights accorded to stockholders. It is respectfully submitted that such study and analysis would be a waste of the valuable time of this Court, and, because of the difference in the facts of each case, the decision of this Court would not result in the creation of any precedent which would be a valuable guide to the lower courts or to reorganizers of corporations in the future.

The question of the legality of the offer, which has been certified by the Circuit Court of Appeals, can be decided by this Court without any examination of the record.

POINT III.

This Court has already decided that the claim of the Petitioners to special treatment for the Terminal Contracts is not a question in respect of which a writ of certiorari will be issued. The argument contained in Point II of the Petitioners' brief is merely an attempt to have this Court reconsider that decision.

As stated above, the basis of the First Appeal was the claim of the Petitioners that the Terminal Contracts were, by reason of the public interest in the maintenance of the union terminals at Kansas City, or for some reason, so sacrosanct that they were in effect prior to the mortgages of the Old Company, and must be assumed by purchasers at foreclosure sale. This Court long ago decided, in *Des Moines R. Co.* v. *Wabash Ry. Co.*, 135 U. S. 576, and in *Express Company* v. *Railroad Company*, 99 U. S. 191, that such contracts have no such priority but are merely ordinary executory contracts. This Court said in the *Des Moines* case, 135 U. S. 576, at page 582:

> "There is nothing * * * * in the nature of the contract which should make it one running with the land, or one chargeable upon the railroad, when by due course of law, or in any other mode, the property passed to other hands."

Following these decisions, the Circuit Court of Appeals, in the First Appeal, held that the Terminal Contracts fell into the class of ordinary executory contracts, that they had no priority over mortgages, did not run with the land, and need not be assumed by the purchaser at foreclosure sale.

These petitioners thereupon applied to this Court for a writ of certiorari, which was refused (264 U. S. 588).

In accordance with the principles laid down in *Magnum Co.* v. *Coty*, *supra*, this Court naturally refused certiorari in the First Appeal, since the questions involved therein had been settled by this Court in the *Des Moines* case and the *Express Company* case, *supra*. Moreover, there is no conflict among the decisions of the Circuit Courts of Appeal. (See for example *Baker* v. *Central Trust Co.*, 235 Fed. 17, 6th Circuit.)

Since there was no reason for certiorari in the First Appeal, there is no reason for certiorari here. As above stated, the Second Appeal involves only two questions, (1) the fairness and reasonableness of the offer to creditors, which has been considered under Point II and (2) the legality of the offer, which is now before this Court. The Petitioners are attempting to reopen the questions settled by the First Appeal by claiming for the Terminal Contracts some special sanctity which would require the obligees thereunder to receive in the reorganization an offer different from that made to all other creditors of the same class,—an offer to assume the Terminal Contracts. The Terminal Contracts were held in the First Appeal to be ordinary executory contracts, no different from other executory contracts, and the rights arising from a breach thereof are the ordinary rights of unsecured creditors. *This is the law of this case.* The contention here made by the petitioners is merely a restatement of their contention that the Terminal Contracts had priority over other executory contracts and over mortgage bondholders, which was finally decided against them in the First Appeal.

Obviously, if the Terminal Contracts are not prior to mortgages, or binding on a purchaser at foreclosure sale, they cannot be given such priority under the guise of an application of the principle of the *Boyd* case.

For the sake of completeness, brief reference may be made to some of the arguments brought forward by the Petitioners in their brief. They say that the Terminal Contracts might be specifically enforced. Even if they

could be specifically enforced against the Old Company, they cannot be specifically enforced against a receiver of the property of the Old Company, or against purchasers at foreclosure sale. *Des Moines R. Co.* v. *Wabash Ry. Co.*, *supra; Baker* v. *Central Trust Company*, *supra.* See also *Wiggins Ferry Co.* v. *Ohio & M. Ry. Co.*, 142 U. S. 396, 408; *Hoard* v. *Chesapeake & O. Ry.*, 123 U. S. 222. If the Petitioners have a right to have a court of equity enter a decree for the amount of damages to which they are entitled, this right is protected. They are now before a court of equity (District Court of the United States for the Eastern District of Missouri) on their intervening petition and that Court has referred to a master the question of ascertaining the damages, if any, to which they are entitled.

The Petitioners cite the cases of *Pierce* v. *United States*, 255 U. S. 398 and *Howard* v. *Maxwell Motor Co.*, 269 Fed. 292, 275 Fed. 53 as showing that offers made in reorganizations must be fair to the obligee of a particular contract.

If by this statement the Petitioners mean that different offers must be made to creditors under different kinds of executory contracts, neither these cases nor any others with which the Respondents are familiar enunciate any such principle. In the *Maxwell* case the Court held that a fair offer had not been made to the lessor under a broken lease, not because he had received only the same offer made to all other creditors, but because he had received no offer. The offer was limited to claims arising prior to a specific date, and the lessee took care not to make default under the lease until after that date had passed.

The *Pierce* case has nothing whatsoever to do with reorganizations. It simply held that the United States, as the creditor of a corporation, may pursue the assets of that corporation even after a voluntary distribution of such assets among stockholders.

The Petitioners also attempt again to make the point they unsuccessfully argued on the First Appeal, that public interest demands that the New Company continue to use these terminals, and that such public interest is sufficient to defeat the legal rights of mortgage bondholders. But this Court has already decided, on the First Appeal, that no important question of public or general interest is here involved. Nor is there anything substantial in the suggestion made in the brief of the Petitioners that the New Company should be required to assume the Terminal Contracts, on such terms as might be found to be equitable. It has been shown in these proceedings that the Terminal Contracts were grossly inequitable as to the Old Company. The New Company has, however, petitioned the Interstate Commerce Commission for authority to use the terminals or such parts thereof as it needs, on reasonable terms, and is now using the terminals pursuant to Service Order No. 40 of the Interstate Commerce Commission entered March 27, 1924 (I. C. C. Docket No. 15682) under the authority of paragraph 15 of Section 1 and paragraph 4 of Section 3 of the Interstate Commerce Act. That order permits the New Company to use the terminals on the terms specified in the Terminal Contracts, pending the decision of the Commission on further hearing as to what would be fair and reasonable terms. A copy of said Service Order No. 40 is Exhibit A hereto. The New Company is using the terminals and has already done, in substance, what the Petitioners suggest that this Court should order it to do. No question of public interest arises.

Obviously, the Circuit Court of Appeals was right when it said in the First Appeal (294 Fed. 32 at page 39):

> "It requires no second sight or prophetic vision to induce a profound suspicion that the itching question here is not whether the New Company shall stay in, but the terms and conditions on which it shall stay in. It follows that the remoteness of injury to the public, if not the utter impossibility of it, renders very serious consideration of the question unnecessary."

CONCLUSION.

The respondents respectfully submit that this Court should deny the application.

Respectfully submitted.

JOSEPH M. BRYSON,
Solicitor for Missouri-Kansas-Texas Railroad Company, Appellee.

ARTHUR H. VANBRUNT, and JOSEPH M. BRYSON,
Solicitors for Francis F. Randolph and Hugo W. Blumenthal, Appellees.

EDWARD CORNELL, CHARLES E. HOTCHKISS and EDWARD C. ELIOT,
Solicitors for Central Union Trust Company of New York, as Trustee under Consolidated Mortgage, and as Trustee under Trust Agreement, Appellee.

GELLER, ROLSTON & BLANC, and NAGEL & KIRBY,
Solicitors for The Farmers' Loan and Trust Company, as Trustee under Refunding Mortgage, and as Trustee under St. Louis Division Mortgage, Appellees.

HORNBLOWER, MILLER & GARRISON, and CHARLES W. BATES,
Solicitors for The New York Trust Company, as Trustee under General Mortgage, Appellee.

BOYLE & PRIEST,
Solicitors for B. F. Edwards, as Trustee under General Mortgage, Appellee.

WHITE & CASE, and GEORGE H. WILLIAMS,
Solicitors for Bankers Trust Company, as Trustee under Second Mortgage, Appellee.

MASTEN & NICHOLS and LEE W. HAGERMAN,
Solicitors for Columbia Trust Company (now Irving Bank-Columbia Trust Company), as Trustee under the First Mortgage of The Missouri, Kansas & Eastern Ry. Co., Appellee.

RICHARDS, SMYTH & CONWAY, and CHARLES A. HOUTS,
Solicitors for Central Union Trust Company of New York, as Trustee under Second Mortgage of M. K. & E. Railway Co., Appellee.

KING, LANE & TRAFFORD, and GEORGE C. HITCHCOCK,
Solicitors for Central Union Trust Company of New York, as Trustee under First Extension Mortgage, Appellee.

CHARLES P. WILLIAMS,
Solicitor for The Farmers' Loan & Trust Company, as Trustee under S. W. Coal & Improvement Company First Mortgage, Appellee.

JOSEPH M. BRYSON,

ALBERT RATHBONE,
ARTHUR H. VANBRUNT,
NICHOLAS KELLEY,

EDWARD CORNELL,
EDWARD C. ELIOT,
H. C. MCCOLLOM,

EDWARD H. BLANC,
ALLEN C. ORRICK,

W. W. MILLER,
CHARLES W. BATES,

GEORGE H. WILLIAMS,
ROBERTS WALKER,

PERRY D. TRAFFORD,
GEORGE C. HITCHCOCK,
of Counsel.

Exhibit A.

SERVICE ORDER No. 40.

At a Session of the INTERSTATE COMMERCE COMMISSION, DIVISION 5, held at its office in Washington, D. C., on the 27th day of March, A. D. 1924.

The subject of the joint or common use of terminals, including main line track or tracks for reasonable distances outside of such terminals, being under consideration, and

It appearing that a controversy exists between the Missouri-Kansas-Texas Railroad Company and the Kansas City Terminal Railway Company, hereinafter termed the petitioner and the Terminal Company, respectively, over the terms under which the petitioner shall be permitted to use the union passenger station and certain of the passenger and freight terminal facilities at Kansas City, Mo., including main line track or tracks outside of such terminals, lying within and included in what are known as zones, numbers 5, 6, 6a, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 33, 33a, 34, 35, 36, 38, 39, 40, 40½, 41, 42, 43, 43½, 44, 44½, 45, 46, 47, 48, 49, 50, 53, 60, 61, 62, 63, 64 and 65, owned and operated by the Terminal Company, which has been brought to the attention of the Commission by a formal complaint filed by said petitioner under No. 15682, and

It further appearing from the allegations of said complaint and by certain correspondence had with petitioner subsequent thereto, that the petitioner has been and is now using said union passenger station and certain other of the terminal facilities of the Terminal Company and is making payment to said Terminal Company therefor in accordance with the terms of a certain agreement entered into by and between the Terminal Company, on the

one hand, and the Missouri, Kansas & Texas Railway Company, hereinafter termed the old company, and other proprietary companies of the Terminal Company, on the other hand, dated June 12, 1909, known by the parties thereto as the Operating Agreement and Supplemental Agreement thereto, dated January 24, 1910, and

It further appearing that the District Court of the United States for the Eastern District of Missouri, Eastern Division, in a proceeding brought before it involving inter alia, the operating agreement in question held that the petitioner, which acquired at foreclosure sale the property of the old company, with certain exceptions not here pertinent, was not required to adopt the operating agreements of the old company, and

It further appearing that the decision of the District Court was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit, and

It further appearing that the Supreme Court of the United States on March 10, 1924, denied the petition of the Terminal Company, et al, for a writ of certiorari, thus making the decision of the United States Circuit Court of Appeals for the Eighth Circuit, final, and

It further appearing that the petitioner has elected not to become a proprietary company of the Terminal Company, and has determined not to adopt the agreements between the Terminal Company and the old company, but desires to use said union passenger station and certain of the other terminal facilities of the Terminal Company upon such terms and for such compensation as the Commission may find to be reasonable, and

It further appearing that the petitioner has notified the Terminal Company that as authorized by the final decree of foreclosure directing the sale of the properties of the Missouri, Kansas & Texas Railway Company it will on or before March 31, 1924, file in the office of the clerk of the District Court of the United States for the Eastern

District of Missouri, Eastern Division, its election to refuse to adopt or continue in force said operating agreement hereinbefore referred to, and

It further appearing that the petitioner has notified the Terminal Company of its desire to enter into an agreement with the Terminal Company for the use of said union passenger station and other terminal facilities including main line tracks as more fully hereinbefore set forth upon what is commonly known as the user basis, and

It further appearing that the Terminal Company has declined to negotiate an agreement upon such terms, and has notified the petitioner that it can only continue to use said union passenger station and other terminal facilities according to the terms of said operating agreement hereinbefore referred to, and

It further appearing that by reason of failure of the parties to agree as to the terms of compensation to be paid for the use of said union passenger station and other terminal facilities the petitioner has been notified by the Terminal Company that it will not be permitted to use said union passenger station and other terminal facilities on and after April 1, 1924, except upon the terms of said operating agreement,

And it further appearing that by reason of said notice of refusal of the Terminal Company to permit the petitioner to use said union passenger station and other terminal facilities except under the terms of the operating agreement entered into by the old company, and which the petitioner is not willing to agree to, an emergency is created which requires the immediate action of the Commission,

And it further appearing that the petitioner in order to adequately secure compensation to the Terminal Company is willing, pending hearing by the Commission, to observe the terms and provisions of the operating agreement and make the payments therein provided without

prejudice to its own rights or those of the Terminal Company,

Therefore, in order best to promote the service in the interest of the public and the commerce of the people, and in order that the constant flow of interstate commerce may not be interfered with,

It is ordered and directed, effective April 1, 1924, and until the further order of the Commission in the premises, that the Kansas City Terminal Railway Company be, and the same is hereby, notified and required to permit the Missouri-Kansas-Texas Railroad Company to use the union passenger station and other terminal facilities at Kansas City, Mo., including main line track or tracks for a reasonable distance outside such terminals, lying within and included in what are known as zones, numbers 5, 6, 6a, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 33, 33a, 34, 35, 36, 38, 39, 40, 40½, 41, 42, 43, 43½, 44, 44½, 45, 46, 47, 48, 49, 50, 53, 60, 61, 62, 63, 64 and 65, upon the terms and provisions of said operating agreement of June 12, 1909, and supplemental agreement of January 24, 1910, and that in order that the Kansas City Terminal Railway Company may be adequately secured as to compensation, the Missouri-Kansas-Texas Railroad Company during such period shall pay the compensation provided for in said operating agreement and supplemental agreement.

It is further ordered that such payments to be made by the Missouri-Kansas-Texas Railroad Company shall not be the final measure of the compensation ultimately to be paid for the period while this emergency order is in effect, but the total compensation ultimately to be paid for such period shall be upon such terms as the carriers may agree upon, or in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable.

And it is further ordered that copy of this order be served upon the

Missouri-Kansas-Texas Railroad Company,
Kansas City Terminal Railway Company,
The Atchison, Topeka & Santa Fe Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago, Great Western Railroad Company,
Chicago, Milwaukee & St. Paul Railroad,
St. Louis-San Francisco Railway Company,
Wabash Railway Company,
Missouri Pacific Railroad Company,
Union Pacific Railroad Company,
The Chicago, Rock Island & Pacific Railway Company,
The Chicago & Alton Railroad Company and William W. Wheelock and William G. Bierd, Receivers thereof,
The Kansas City Southern Railway Company,

and that notice of this order be given to the general public by depositing a copy hereof in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 5:

[SEAL]

GEORGE B. MCGINTY,
Secretary.

EXHIBIT B.

UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 6457.

KANSAS CITY TERMINAL RAILWAY COMPANY ET AL.,
Appellants,

vs.

CENTRAL UNION TRUST COMPANY OF NEW YORK ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Amended Certificate—Filed April 25, 1925.

This amended certificate is presented, in lieu of the certificate heretofore filed, in order that certain additional facts (deemed by the parties and this court of use in determining the questions herein submitted) might be brought to the attention of the court.

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on an appeal now pending before it discloses the following:

The Kansas City Terminal Railway Company and others filed an intervening petition in the receivership proceedings of the Missouri, Kansas & Texas Railway Company. That intervention sought to attach the obligations of passenger terminal contracts to the property in such a way that the obligations of these contracts would be either a lien on the property prior to all mortgage obligations or would follow the property into the hands of any purchaser under foreclosure of the mortgages. It was determined by the district

court and affirmed by this court (294 Fed. 32) that these terminal contracts were ordinary executory contracts entered into by the Missouri, Kansas & Texas Railway Company as aids to its operation.

Thereafter, the property in receivership was sold under foreclosure. The purchase was in pursuance of a reorganization plan. This plan involved lien holders, unsecured creditors and stockholders. In so far as the plan affects lien holders it is not involved in this appeal. The points raised on this appeal relate to the fairness of the offer to these interveners which were classed as unsecured creditors. This plan was not submitted to the court but the offer to unsecured creditors, as contained therein, was submitted and approved. Their claim is that the stockholders were unduly preferred in this reorganization plan.

By the reorganization plan the new company was to have four classes of securities as follows:

Prior Lien Mortgage Bonds (authorized issue $250,000,000),

Cumulative Adjustment Mortgage Bonds (authorized issue $100,000,000) which were income bonds secured by mortgage as to principal, Preferred Stock (authorized issue $200,000,000),

Common Stock without par value (authorized issue 2,500,000 shares).

Of the above securities, certain amounts of each were reserved for future use by the new company. Of the prior lien bonds provided for distribution in the plan, some bore interest at four per cent, some at five per cent and some at six per cent respectively.

Under the reorganization plan new securities were offered to the holders of seventeen separate issues of outstanding bonds of the Missouri, Kansas & Texas Railway Company and its various subsidiary companies secured by mortgage and of one issue of notes secured by the pledge of mortgage bonds. In some cases, but not in all, cash was offered to the holders of these secured claims in addition to new

securities. In all cases the par amount of the new securities offered (taking the new non par value common stock at $100 per share) plus the cash offered, if any, equalled, and in no case did it exceed, the principal amount of the old outstanding securities in respect of which the offer was made plus the unpaid interest thereon up to January 1, 1922.

Of said eighteen outstanding issues

Five issues were offered only New Prior Lien Bonds and cash,

One issue was offered only New Prior Lien Bonds,

Five issues were offered only New Prior Lien Bonds and New Adjustment Bonds,

Three issues were offered only New Prior Lien Bonds, New Adjustment Bonds and New Preferred Stock,

One issue was offered only New Adjustment Bonds and New Preferred Stock,

Three issues were offered only, New Adjustment Bonds, New Preferred Stock and New Common Stock,

In all cases the New Prior Lien Bonds and the New Adjustment Bonds (whether offered to secured creditors, unsecured creditors or stockholders) were to bear interest from January 1, 1922.

In so far as the re-organization plan affected stockholders and unsecured creditors its provisions were substantially as follows: (1) Preferred stockholders were entitled to receive $14 in Prior Lien Bonds (bearing six per cent interest), $6 in Adjustment Bonds and one share of Common Stock in the new company upon payment of $20 for each share of stock of the par value of $100 held in the old company; (2) Common stockholders were entitled to receive $17.50 in Prior Lien Mortgage Bonds (bearing six per cent interest), $7.50 in Adjustment Bonds and one share of Common Stock upon payment of $25 for each share of stock of the par value of $100 held in the old company; (3) Unsecured creditors were given the choice of two plans: (*a*) one-third

of a share of Preferred Stock of the par value of $100 and two-thirds of a share of Common Stock without par value for each $100 of the aggregate amount of the claim, including interest to January 1, 1922, whereas the receiver was appointed and took possession of the property on September 27, 1915, the foreclosure decree was entered on June 30, 1922, the offer to creditors was dated July 15, 1922, the foreclosure sale was had on December 13, 1922, the order confirming the sale was entered February 9, 1923, and the order approving the Master's deed conveying the property to the new company was entered on March 10, 1923; (*b*) $14 in Prior Lien Mortgage six per cent bonds, $6 in Adjustment Mortgage Bonds and one share of Common Stock upon payment of $18 for each $100 of said claim.

A claim made by appellants here is that certain decisions of the Supreme Court of the United States (Northern Pacific Railway Company *v.* Boyd, 228 U. S. 482; Louisville Trust Company *v.* Louisville Railway Company, 174 U. S. 674) require that an offer in a re-organization plan, in order to be a fair and binding offer upon the creditor must be one which will preserve "to the creditor, his relative priority over the stockholder. It is not sufficient that he should get a little more than the stockholder. His entire claim must take precedence over any part of the interest of a stockholder. It is not sufficient that he be offered securities of the same grade as the stockholder but a trifle more in amount, or that the stockholder's right to participate be conditioned upon the payment of an assessment."

It is further certified that the following questions of law arise from this record and are presented, the decision of which is indispensable to a determination of the case. To the end that this court may properly discharge its duty it desires the instruction of the Supreme Court upon them.

Question I. Is a plan of re-organization of a railway company sufficient as to unsecured creditors and binding upon them which does not give precedence to the entire claim of the creditor over any part or interest of a stockholder in the old company?

Question II. Is such a plan fair and binding upon such creditors even though they be offered securities of the same grade as the stockholders, the difference being only in the greater amount offered the creditor, provided the court shall be of the opinion that the offer tenders to such creditor all that could reasonably be expected under all of the existing circumstances?

Question III. Is such offer as to such creditors fair and binding if it consists only of the same grade of securiites as offered the stockholders, the difference being that the right of the stockholder to participate is conditioned upon the payment of an assessment or the payment of a relatively greater assessment than that asked of such creditors, provided the court shall be of the opinion that the offer tenders to such creditor all that could reasonably be expected under all of the existing circumstances?

KIMBROUGH STONE,
United States Circuit Judge.
WILLIAM S. KENYON,
United States Circuit Judge.
C. B. FARIS,
United States Circuit Judge.

Being the Judges who sat in the Circuit Court of Appeals, on the hearing of the case.

UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing Amended Certificate in the case of Kansas City Terminal Railway Company et al., appellants, *vs.* Central Union Trust Company of New York et al., appellees, No. 6457, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-third day of April, A. D. 1925.

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 6457. Kansas City Terminal Railway Company et al., appellants, *vs.* Central Union Trust Company of New York et al. Amended Certificate of Questions to the Supreme Court of the United States. Filed April 23, 1925. E. E. Koch, clerk.